IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-492

UNITED STATES OF AMERICA,

Respondent,

by DOROTHY S. GREENBERG,
for herself as well as for the United States of America,

Petitioner,

—against—

THE BURMAH OIL COMPANY LIMITED, BURMAH OIL INCORPORATED, BURMAH OIL TANKERS LIMITED, BETHEL MARINE, INC., SOUTHHOLD MARINE, INC., VERMONT MARINE, INC., BURMAST EAST SHIPPING CORP., BURMAH GAS TRANSPORTATION LIMITED, ELIAS J. KULUKUNDIS, SUMMITT MARINE OPERATIONS, INC., SUMMITT I, INC., SUMMITT II, INC., SUMMITT III, INC., CHEROKEE I SHIPPING CORPORATION, CHEROKEE II SHIPPING CORPORATION, CHEROKEE III SHIPPING CORPORATION, CHEROKEE IV SHIPPING CORPORATION, CHEROKEE V SHIPPING CORPORATION, ENERGY TRANSPORTATION CORPORATION, C. Y. CHEN, JOSEPH J. CUNEO, JEROME SHELBY, CRYOGENIC ENERGY TRANSPORT, INC., LNG TRANSPORT INC., LIQUEGAS TRANSPORT INC., JAMES DURBIN, JOHN C. BULLITT, FIRST NATIONAL CITY BANK, CITICORP LEASING, INC., GENERAL AMERICAN TRANSPORTATION CORP., GENERAL DYNAMICS CORPORATION, CITIMARLEASE (BURMAH I), INC., CITIMARLEASE (BURMAH LNG CARRIER), INC., CITIMARLEASE (BURMAH LIQUEGAS), INC., and CITICORP,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF DEFENDANTS-RESPONDENTS IN OPPOSITION

November 2, 1977

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

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BRIEF OF DEFENDANTS-RESPONDENTS IN OPPOSITION

Question Presented

Was the Court of Appeals correct in unanimously affirming the District Court's dismissal of this action for lack of subject matter jurisdiction pursuant to 31 U.S.C. § 232(C) where:

> (a) the Government established that the action was based upon "evidence or information within [its] possession" prior to suit and sought dismissal on that ground;
>
> (b) by the time petitioner's complaint was filed, the "fraud" it alleged was already under investigation by no less than four federal authorities, including the Department of Justice; and
>
> (c) the same allegations had also been prominently reported by the press prior to petitioner's suit—particularly in a front-page *New York Times* article, which appeared a month and a half before the complaint was filed?

Petitioner seeks to persuade this Court to hear a case not in conflict with prior decisions of this or any other court, involving neither a significant question nor a unique interpretation of federal law and in which her contentions have been rejected by every judge who has considered them.

There is no issue worthy of *certiorari*.

Statement of the Facts

On September 30, 1976, petitioner Dorothy Greenberg commenced a *qui tam* action under the False Claims Act, 31 U.S.C. §§ 231 *et seq.* (1970 & Supp. V 1975) (the "Act"), seeking damages on behalf of the United States and a substantial bounty for herself. The essential allegation contained in her 23-page complaint is that the respondents participated in or knowingly aided and abetted a conspiracy to defraud the United States by requesting certain subsidies and loan guarantees in connection with the construction of liquefied natural gas tankers.

Specifically, petitioner alleged that several of the defendants-respondents applied to the Maritime Administration for construction differential subsidies pursuant to Title V of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1151 *et seq.* (1970 & Supp. V 1975), and for ship mortgage guarantees pursuant to Title XI of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1271 *et seq.* (1970 & Supp. V 1975), both of which are available only to United States citizens within the meaning of the Shipping Act, 1916, as amended. 46 U.S.C. § 1274(a) (Supp. V 1975), 46 U.S.C. § 1151(c) (1970). According to petitioner, the applications falsely represented that the relevant parties were United States citizens. Together with her complaint, she tendered nine documents and a collection of news clippings, listed in Schedule A thereto, which she claims indicate that by filing the applications, the defendants-respondents made false claims against the United States.* (A-23 through A-99)**

On December 1, 1976, the United States Attorney for the Southern District of New York moved to dismiss the complaint pursuant to section 232(C) of the Act, which provides that:

> "[t]he court shall have no jurisdiction to proceed with [a *qui tam* suit] whenever it shall be made to appear

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* Section 232(C) of the Act requires a relator commencing suit under section 232(B) to serve upon the Attorney General "a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit".

** References to "A-...." are to Petitioner's Appendix herein.

that such suit was based upon *evidence or information* in the possession of the United States, or any agency, officer or employee thereof at the time such suit was brought. . . ." (emphasis added)

The defendants-respondents joined in that motion.

As the Government's moving papers demonstrated, prior to the filing of the present action, numerous investigations into allegations of non-compliance with the citizenship requirements of the Shipping Act had already been commenced by various executive agencies, a congressional committee and the General Accounting Office. The Government's papers also detailed the extensive underlying data in its possession upon which such investigations were based. The abundant contemporaneous press coverage of those same allegations and events was noted. Of particular significance were articles appearing in the August 19 and 21, 1976 editions of *The New York Times* wherein the transactions in question were described in detail and several documents tendered by petitioner as a basis for this action were specifically identified and quoted.*

Judge Whitman Knapp granted the Government's motion to dismiss on December 22, 1976, stating:

"The alleged fraud which the relator seeks to redress was the subject of an inquiry in March, 1976 by

* For example, the August 19th article begins:

"The Securities and Exchange Commission, the Federal Maritime Administration and at least one Congressional committee are investigating whether the Burmah Oil Company, a major British concern, illegally received commitments for Federal guarantees or subsidies to build at least eight huge tanker ships in this country. . . .

• • •

"At issue is whether the ships have any right to American subsidies or loan guarantees, since Burmah is not an American company. Federal law specifies that only domestic concerns can receive such Government backing." (A-60)

Congressman Les Aspin. In May, 1976, the Congressman referred the matter to the House Committee on Government Operations and to the Department of Justice; both commenced investigations. In early September the SEC began its own inquiry into the corporate transactions involved. Moreover, in August the alleged scandal was brought to the public's attention by a series of articles published in the *New York Times*, and was subsequently carried by other newspapers."

As to the documents tendered by petitioner, the Court found that:

"[w]ith possibly one exception those documents, or the information contained in them, were within the actual possession of one or another government body before the complaint was filed."

Furthermore, with respect to the one possible exception, the so-called "Kurrus Memorandum," Judge Knapp found that it

"was specifically identified and fully described in an August *New York Times* article. As a result, the information it contained was public knowledge".* (A-12)

* That document, upon which relator premises her entire petition to this Court, was identified and discussed in the August 19th front-page *New York Times* article:

"In a memorandum to John J. McMullen, former president of Burmah Oil Tankers, Richard Kurrus of the Washington law firm reported that he had engaged in a conversation about Burmah on May 8, 1975, with Mr. Blackwell, the Assistant Secretary of Commerce, and Samuel Nemirow, assistant general counsel of the Maritime Administration.

Mr. Kurrus reported that he met with Mr. Blackwell for lunch later the same day and Mr. Blackwell said he felt that Elias J. Kulkundis [sic], an earlier president of Burmah Oil

(footnote continued on following page)

Petitioner appealed the District Court's order of dismissal to the United States Court of Appeals for the Second Circuit. At the close of oral argument on May 11, 1977, the panel, consisting of Judges Lumbard, Meskill and Jameson,* unanimously affirmed. In its subsequently filed *per curiam* opinion, the Court upheld Judge Knapp's finding that the Government actually possessed all but one document proffered by petitioner and that that document was publicly identified and described in the press. (A-2 through A-7) The Court also specifically rejected plaintiff's theory that her assembling information already in the Government's possession was sufficient to confer jurisdiction by stating that:

> "[t]he statute is clear and explicit. Jurisdiction is defeated by the government's possession of the information." (A-6)

Thereafter, petitioner moved for reargument and rehearing *en banc*. Both motions were unanimously denied. (A-8 and 9)

(footnote continued from previous page)

> Tankers, 'may have acted imprudently and perhaps even improperly in the deals he set up.'
>
> Mr. Kurrus quoted Mr. Blackwell as saying that he was aware that problems had arisen over the Title XI financing and that 'everyone recognized' that the formal arrangement approved by the Maritime Administration 'was based on friction [sic].' "

This article, as petitioner concedes (Petition at 10), was in the Government's possession prior to the commencement of the present action.

* Hon. William J. Jameson of the District of Montana sitting by designation.

ARGUMENT

POINT I

Petitioner's Position, Which Failed To Gain Even A Single Vote From Any Judge Below, Does Not Merit Review By This Court.

Stripped of its verbiage, petitioner's appeal is limited to the narrow facts of this particular case,* which facts were the subject of concordant findings by the District Court and the Court of Appeals. There is no showing by petitioner, nor could there be, that an "obvious and exceptional error" is presented here which should cause this Court to review the unanimous findings below. *See United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *District Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

The correctness of the determinations below is particularly apparent here because the statute requires a relator to designate in writing "substantially all evidence and information in his possession material to the effective prosecution of such suit" and then mandates comparison to the "evidence or information" in the Government's possession. 31 U.S.C. § 232(C). Thus, the trial court and the Court of Appeals undertook a thorough comparison between the information contained in the 232 pages of documents submitted by petitioner and the information already in the possession of the "United States, or any agency, officer or employee thereof" as was set forth in the Government's

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* Petitioner attempts to raise legal questions concerning the construction of the Act but, as explained below, the case law and the legislative history of the Act unanimously support respondents' position. Thus, no real question of law is presented by this appeal.

two hundred page submission below.* We respectfully submit that repetition by this Court of such a time-consuming review, after petitioner failed to convince a single judge below that her position has any merit whatsoever, constitutes an unwarranted intrusion into this Court's time and energies. Indeed, as this Court emphasized in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co., supra:*

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." 336 U.S. at 275 (citations omitted)

No such showing has been or can be made here, and, accordingly, the petition should be denied.

POINT II

The Legal Standard Applied Below In Determining Lack Of Jurisdiction Is Correct And Consistent With The Decisions Of Other Courts Which Have Considered The Question.

The only issue presented by the statute and decided below was whether petitioner's suit was based on information in the possession of the Government on the date she commenced her action—September 30, 1976. If it was, subject matter jurisdiction is lacking.

Both courts below as well as all of the other courts which have had occasion to consider the standard to be applied

* Indeed, the Court of Appeals had before it as Annex B to the Brief of Defendants-Appellees (Respondents) a tabular comparison of petitioner's documents and the governmental agency which possessed the information therein prior to September 30, 1976.

in determining this issue have consistently employed a qualitative standard. Under such a standard, a district court has no jurisdiction over a *qui tam* suit where the material or essential information upon which the citizen's suit is based was in the possession of the Government at the time the suit was filed. This test was succinctly stated in *United States* v. *Aster,* 176 F.Supp. 208 (E.D. Pa. 1959), *aff'd,* 275 F.2d 281 (3d Cir.), *cert. denied,* 364 U.S. 894 (1960), where the District Court, in dismissing an action similar to petitioner's for lack of jurisdiction, held:

> "[T]he *essential* information upon which the present suit is predicated was supplied to and was in the possession of the United States before this suit was filed." 176 F.Supp. 209 (emphasis added)

In affirming that dismissal, the Court of Appeals specifically endorsed the "essential information" standard. 275 F.2d at 282. *Accord, United States ex rel. Thompson* v. *Hays,* Civ. Action No. 76-1078 (D.D.C. October 30, 1976), *appeal dismissed,* Dkt. No. 76-2151 (D.C. Cir. March 18, 1977) ("crucial evidence or information"); *United States ex rel. Vance* v. *Westinghouse Electric Corp.,* 363 F. Supp. 1038 (W.D. Pa. 1973) ("essential information"); *United States ex rel. McLaughlin* v. *American Chain & Cable Co.,* 62 F. Supp. 302, 303 (S.D.N.Y. 1945) ("material information").

This same standard was correctly applied in the present case. Not only did both courts concur that at the time petitioner filed suit the Government physically possessed all but one of the actual documents tendered by her but, as to that one, (the "Kurrus Memorandum", *see* p. 5, n., *supra*) the Court of Appeals specifically found that

> "[t]he government's possession of the material information contained in the memorandum is enough under the statute to divest the court of jurisdiction". (A-6)

Thus, the lower courts correctly applied a "material evidence" standard consistent with prior decisions of other courts which have considered the question.

Despite the clear words of the statute, petitioner also argues that the lower courts' interpretation of the Act was erroneous in that section 232(C) should operate to preclude *only* "parasitical" suits, *i.e., qui tam* actions based solely on publicly available information. Such an interpretation is not only contrary to the plain language of the statute, but to the legislative history of the Act and to all of the case law on the subject. For example, in spite of its length, petitioner's prolix examination of the legislative history of the Act is conspicuously incomplete in that it addresses only an early Senate version of the bill and ignores the conference bill which was ultimately enacted. The version of the bill originally passed by the House entirely abolished private suits under the Act, *see United States* v. *Pittman*, 151 F.2d 851, 853 (5th Cir. 1945), *cert. denied*, 328 U.S. 843 (1946), while the Senate bill would have allowed suits

> "based upon information, evidence and sources original with [relator] and not in the possession of or obtained by the United States in the course of any investigation or proceeding by it. . . ." S.Rep.No. 291, 78th Cong., 1st Sess. (1943), *reprinted* in [1943] U.S. Code Cong. Serv. 2.324 at 2.325.

Thereafter, the conference committee adopted the language in the jurisdictional section of the present statute. Judge Hastie related the Senate debate which followed the conference committee's action in *United States* v. *Aster*, *supra:*

> "Particularly noteworthy is the debate which ensued in the Senate where *Senator Langer* vigorously attacked the conference compromise as practically abolishing the qui tam procedure and *proposed* resubmission of the matter to the conference committee with instructions that the Senate conferees insist *that only the parasitical action of the relator who uses public information as the basis of his suit*—the situation of United States ex rel. Marcus v. Hess—*should be abolished.* 89 Cong. Rec. 10746-51. *However, the Senate rejected this motion and adopted the conference report.* 89 Cong. Rec. 10752." 176 F.Supp. at 209-10 (emphasis added)

Thus, not only do the clear words of the statute preclude private suits where the Government already had possession of the essential information, but the contrary interpretation urged by petitioner was specifically rejected by Congress in its debate. Moreover, judicial decisions interpreting section 232(C) confirm that it was intended to bar *all* suits where the United States had the essential information at the time the suit was filed and not just "parasitical" suits, as petitioner uses that term.* For example, petitioner's copious quotation from and exclusive reliance on *United States ex rel. Davis* v. *Long's Drugs, Inc.*, 411 F.Supp. 1144 (S.D. Cal. 1976) (Petition at 40-42) is notably incomplete in that it omits the paragraph immediately preceding the quoted portion which is directly contrary to the interpretation she urges. There, the court sets forth its understanding of "parasitical" suits:

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* Ironically, even if petitioner's strained "parasitical" suit theory were accepted, her argument to this Court would be unaided. The information upon which petitioner rests her claim was not only in the possession of the Government but was also fully summarized in the *New York Times* articles appearing long before she commenced her action. Thus, even accepting her erroneous premise, the decisions below were still correct since this suit was based entirely on publicly available information and, therefore, jurisdictionally barred.

> "It seems apparent that the purpose of Congress in enacting section 232(C) of the False Claims Act was to prevent parasitical suits where the relator attempts to base his action on non-original information already in the possession of the 'United States, or any agency, officer or employee thereof'." *Id.* at 1152.

Accord, United States ex rel. Thompson v. *Hays, supra; United States ex rel. Vance* v. *Westinghouse Electric Corp., supra.*

Therefore, the standard applied by the courts below is consistent with the plain language of the statute, its legislative history and all of the decisions which have thus far construed it.

In her lengthy arguments, petitioner studiously ignores both the letter and the spirit of the False Claims Act as set forth by the District Court and the Court of Appeals in this case and by other federal courts faced with similar questions. Rather than awakening a sleeping and oblivious Government to new evidence or information concerning fraudulent claims, she is attempting to dictate to, *inter alia,* the Department of Justice, the Department of Commerce, the Securities and Exchange Commission and the Congress how and when to do their respective jobs. We submit that the courts below correctly refused to aid her in this exercise.

The False Claims Act was clearly intended to reward private citizens only for awakening the Government to frauds of which it was oblivious. It does not allow such private individuals to become public prosecutors and substitute their judgment for that of the Justice Department. As the District Court noted below (A-13):

> "The Act was designed to encourge citizens to come forward with information of which the Government might

> be ignorant. It was not designed to permit citizens to call upon the courts to supervise the manner in which the Government deals with information it already has". (citations omitted)

Obviously, Congress never intended to expose citizens to suits by anybody and everybody who disagrees with the Department of Justice. The legislative purpose was to alert the Government, not supersede it.

Moreover, it is significant to note that, as applied to the facts of this case, the decisions below are undeniably correct. The various governmental investigations, both in progress at the time petitioner filed this action and commenced thereafter, have concluded that no false claims were made on the United States and that the citizenship requirements of the Merchant Marine Act had been met. For example, after undertaking an exhaustive investigation into these matters, the United States Attorney for the Southern District of New York, who coordinated the Justice Department's investigation, reported to the General Counsel of the Maritime Administration that:

> ". . . we have concluded that the facts of which we are aware do not justify the initiation of criminal or civil proceedings for violation of the citizenship requirements or the False Claims Act." *

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* This excerpt from the U.S. Attorney's report appears in a Commerce Department Release dated January 19, 1977 wherein Secretary of Commerce Elliot Richardson announced that, with his full knowledge and approval, the Maritime Administration had made a final commitment to provide Title XI guarantees with respect to the so-called Cherokee I through Cherokee V applications of which petitioner complains herein. In announcing those commitments, the Secretary stated that:

> "These loan guarantees are being extended after a thorough analysis by the Maritime Administration of the economic

(footnote continued on following page)

Similarly, the General Accounting Office concluded, after conducting an investigation requested by Congressman Jack Brooks, Chairman of the House Committee on Government Operations, in a report to Congressman Brooks dated May 16, 1977, that

> "the legal requirements for Title XI financing for the eight vessels appear to have been met."

Thus, not only did the Government have in its possession the information upon which petitioner's claim is based, but it acted upon it and concluded, after thorough investigation, that the allegations therein lacked any merit whatsoever.

CONCLUSION

Petitioner has burdened this Court with an overly long brief which fails to counter the simple conclusion reached by Judge Knapp and affirmed by the Court of Appeals—that this case is based on evidence or information which was already in the possession of the United States at the time suit was filed. Her attempt to act herein as a *qui tam* plaintiff flies directly in the face of the purpose of the False Claims Act and the jurisdictional abatement provision thereunder and merits no further indulgence by this Court.

(footnote continued from previous page)

soundness of the overall project and of the legal qualifications of the applicant."

The Commerce Department Release was before the Court of Appeals as Annex A to the Brief of Defendants-Appellees (Respondents).

For all the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be in all respects denied.

Respectfully submitted,

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